Torita Rubber Works Sdn Bhd v Chew Chong Eu

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO D2–25–10 OF 2007
HAMID SULTAN JC
19 JUNE 2009

Companies and Corporations — Winding up — Liquidators — Duties — Duty to use skill, diligence, competence and knowledge properly attributable to a professional person — Whether high standard of care required — Whether court to interfere where liquidators' conduct likely to compromise justice, equity and good conscience — Whether liquidator to refer serious doubts or difficulties to court for guidance — Companies Act 1965 ss 236, 269(1) & 279

Companies and Corporations — Winding up — Proof of debts — Rejection of proof of debt by liquidator — Whether liquidator could reject lawful claim where company was solvent — Whether liquidator to seek courts' directions where debt claimed was doubtful — Whether liquidator empowered to set-off debt — Companies (Winding Up) Rules 1972 rr 92 & 93

The applicant filed this notice of motion seeking to appeal from the decision of the respondent liquidator of Everlord Sdn Bhd, (in voluntary liquidation) in rejecting the applicant's proof of debt lodged with the respondent as liquidator of the company. The applicant claimed for monies due and owing for goods duly sold and delivered to the company. The full details of the company's debt owing to the applicant, together with the relevant supporting documents had been furnished to the respondent in the applicant's proof of debt. The applicant claimed that notwithstanding this, the respondent had rejected in full the applicant's proof of debt without any valid reason. The application was made pursuant to Companies (Winding Up) Rules 1972 ('Rules'). The applicant also relied on s 279 of the Companies Act 1965 ('the Act'). The respondent argued, inter alia: (i) that the applicant's proof of debt had not been proven and thus was unenforceable in law; (ii) that there were overwhelming documentary evidences showing that the goods supplied by the applicant to the company were defective; (iii) that the defective goods had attributed to the losses suffered by the company and as such it was justifiable for the company to set-off the applicant's debt against the losses; (iv) that the respondent had acted fairly, independently and in good faith in examining the applicant's proof of debt based on documentary evidence furnished from both the applicant and the company records which were available to the respondent.

Held, allowing the plaintiff's application with no order as to costs:

(1) The act of set-off is an adjudicating process and the liquidator is not empowered to do so pursuant to ss 269 or 236 of the Act (see para 11(a)).

(2) There is a distinction between 'debts', 'provable debts' etc in relation to solvent and insolvent companies. Where the company is solvent, the liquidator has no right to reject a lawful claim as s 269(2) of the Act specifically says the liquidator must pay the debts of the company. In all cases inclusive of insolvent company where the liquidator takes the view the claim is not maintainable he may ask proper directions from court naming the relevant parties or request the creditor or claimant to seek appropriate directions from the court etc. The Companies Act or Winding Up Rules do not encourage any form of high handedness by the liquidator (see para 11(d) & (e)).

(3) The statute imposes on the court a duty to interfere when there is a threat of justice, equity and good conscience likely to be compromised by the conduct of the liquidator. The liquidator is under a duty to use his skill, diligence, competence, and knowledge properly attributable to a professional person, and if he so acts, he has fulfilled the statutory duty but that does not necessarily mean the court has no powers to interfere pursuant to s 274 of the Act, but ordinarily it will not do so. A high standard of care is required from a liquidator. It will be prudent for a liquidator in every case of serious doubt or difficulty in relation to performance of his statutory duties, to submit the matter to court for its guidance (see para 11(f)).

(4) The applicants had filed a civil suit which had not been determined and also filed proof of debt with the liquidator which was rejected. It was a proper exercise of judicial discretion pursuant to s 279 of the Act to direct the liquidator to accept the proof of debt and make the payment (if any) in respect of the applicant's claim after the final determination of the suit inclusive of the appeal process (see para 11(g)).

Obiter:

Even a liberal reading of s 269 of the Act and the whole s 236 does not give any power to the liquidator to reject the creditors claim. The so called powers, spelt out in r 92 of the Rules which is only a subsidiary legislation run foul of the Parent Act. Rule 92 must not be considered as a power but merely a procedural formality, subject to appropriate directions of court, pursuant to s 279 and r 93 of the Rules.

[Bahasa Malaysia summary

Pemohon memfailkan notis usul ini untuk merayu terhadap keputusan

responden likuidator Everlord Sdn Bhd, (dalam likuidasi sukarela) dalam menolak pembuktian hutang pemohon yang diserahkan kepada responden sebagai likuidator syarikat tersebut. Pemohon menuntut wang terakru dan terhutang untuk barangan telah dijual dan dihantar kepada syarikat tersebut. Butiran penuh hutang-hutang syarikat tersebut kepada pemohon, bersama dengan dokumentasi sokongan yang relevan telah diberi kepada responden dalam pembuktian hutang pemohon. Pemohon menyatakan bahawa, walau sebegitu, responden menolak sepenuhnya pembuktian hutang pemohon tanpa sebarang alasan. Permohonan tersebut dibuat berikutan Kaedah-Kaedah Syarikat (Penggulungan) 1972 ('Kaedah-Kaedah tersebut'). Pemohon juga mengguna pakai s 279 Akta Syarikat 1965 ('Akta'). Responden berhujah, antara lain: (a) bahawa pembuktian hutang pemohon tidak dapat dibuktikan dan oleh itu, tidak boleh dikuatkuasakan atas undang-undang; (b) bahawa terdapat banyak keterangan dokumentar yang menunjukkan bahawa barangan yang dibekalkan oleh pemohon kepada syarikat tersebut rosak; (c) bahawa barangan yang rosak itu menyumbang kepada kerugian yang dialami oleh syarikat tersebut dan oleh itu adalah wajar bagi syarikat tersebut menolak kerugiannya daripada hutang pemohon; dan (d) bahawa responden telah bertindak secara adil, berasingan dan dengan suci hati dalam meneliti pembuktian hutang pemohon berdasarkan keterangan dokumentar yang telah dikemukakan oleh pemohon dan juga daripada rekod-rekod syarikat tersebut yang telah diberi kepada responden.

Diputuskan, membenarkan permohonan plaintif tanpa perintah untuk kos:

(1) Tindakan penolakan tersebut merupakan suatu proses kehakiman dan likuidator tidak mempunyai kuasa untuk berbuat demikian berikutan ss 269 atau 236 Akta tersebut (lihat perenggan 11(a)).

(2) Terdapat perbezaan antara 'hutang-hutang', 'hutang-hutang boleh bukti', dll yang berkaitan dengan syarikat mampu bayar dan syarikat bankrap. Apabila sesuatu syarikat itu mampu bayar, likuidator tidak berhak menolak tuntutan yang sah kerana s 269(2) Akta menyatakan dengan terperinci bahawa likuidator mesti membayar hutang-hutang syarikat. Dalam semua kes termasuklah bagi syarikat bankrap apabila likuidator berpendapat bahawa tuntutan tersebut tidak dapat dipenuhi dia boleh meminta arahan yang tepat daripada mahkamah menamakan pihak-pihak yang relevan atau meminta pemiutang atau penuntut meminta arahan yang bertepatan daripada mahkamah. Akta Syarikat atau Kaedah-Kaedah Penggulungan tidak menggalakkan likuidator mengambil tindakannya sendiri (lihat perenggan 11(d) & (e)).

(3) Statut memperuntukkan ke atas mahkamah suatu tanggungjawab untuk mencampuri sesuatu urusan apabila mungkin tercabarnya keadilan, ekuiti dan kebaikan mungkin akan dikompromi oleh tindak

tanduk likuidator. Likuidator adalah berkewajipan menggunakan kemahiran, ketelitian, kebolehan dan pengetahuannya secara bertepatan sebagai seorang profesional, dan jika dia bertindak sedemikian, dia telah memenuhi tanggungjawab statutorinya tetapi itu tidak bermakna mahkamah tidak berkuasa mencampuri urusannya berikutan s 274 Akta, tetapi, biasanya, mahkamah tidak akan berbuat demikian. Kewajipan berjaga-jaga yang tinggi diperlukan daripada seorang likuidator. Adalah bijak bagi seorang likuidator apabila menghadapi keraguan atau kepayahan yang serius dalam menjalankan tanggungjawabnya, meminta petunjuk mahkamah dalam perkara tersebut (lihat perenggan 11(f)).

(4) Pemohon-pemohon telah memfailkan tindakan sivil yang masih belum diberi kata putus dan juga telah memfailkan pembuktian hutang yang mana telah ditolak. Ia merupakan tindakan budi bicara kehakiman yang betul berikutan s 279 Akta untuk mengarahkan likuidator menerima pembuktian hutang tersebut dan membuat bayaran (jika ada) terhadap tuntutan pemohon setelah keputusan muktamad tindakan tersebut termasuklah dengan proses rayuan (lihat perenggan 11(g)).

Obiter:

Walau dengan pembacaan liberal kepada s 269 Akta tersebut dan keseluruhan s 236 tidak memberi apa-apa kuasa kepada likuidator untuk menolak tuntutan pemiutang-pemiutang. Kuasa yang kononnya diberi oleh k 92 Kaedah-Kaedah tersebut hanyalah merupakan undang-undang kecil yang melangkaui Akta Induk. Kaedah 92 tidak boleh dianggap sebagai kuasa tetapi hanyalah keformalan prosedur, tertakluk kepada arahan-arahan yang tepat daripada mahkamah, berikutan s 279 dan k 93 Kaedah-Kaedah tersebut.]

Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1205–1243.

For cases on proof of debts, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1477–1489.

Cases referred to

Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor [2007] 2 MLJ 12, CA (not folld)

ERPIMA SA v Chee Yoh Chuang & Anor [1998] 1 SLR 83, HC (refd)

Home and Colonial Insurance Co Ltd, Re [1930] 1 Ch 102 (refd)

Kerajaan Malaysia v Chew Boon Heow (as liquidator for Syarikat Sin Hwa Plantations Sdn Bhd [2002] 2 MLJ 266, CA (not folld)

KTS News Sdn Bhd v See Hua Realty Bhd & Ors [2006] MLJU 360, HC (not folld)

Lubin, Rosen and Associates Ltd, Re [1987] 1 WLR 93, Ch (refd)
Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157; [1985] 1 CLJ 242, FC (refd)
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatriam & Ors [1995] 2 MLJ 709, FC (folld)
Wangi Forwarding & Shipping Sdn Bhd v MBf Commercial Vehicles Sdn Bhd; Turbo Age Sdn Bhd (Applicant) [2006] MLJU 405, HC (not folld)

Legislation referred to
Companies Act 1956 [IND] s 528
Companies Act 1965 ss 236, 236(1)(b), (c), (d), (e), 269, 269(1)(a), (2), 274, 279, 291(1)
Companies (Winding Up) Rules 1972 rr 78, 79, 92, 93
Interpretation Acts 1948 and 1967 s 23

MK Yee (K Kavitha with him) (Shearn Delamore & Co) for the plaintiff.
Joey Wong (Wong) for the defendant.

Hamid Sultan JC:

[1] This is my judgment in respect of the notice of motion of the applicant seeking to appeal from the decision of the respondent liquidator of Everlord Sdn Bhd, (in voluntary liquidation) in rejecting the applicant's proof of debt dated 30 December 2005 lodged with the respondent as liquidator of the company. The prayer, inter alia, reads as follows:

(a) that the decision of the respondent as liquidator of Everlord Sdn Bhd (in liquidation) ('the company') in rejecting the applicant's proof of debt dated 30 December 2005 for the principal sum of RM433,661.07 together with continuing interests thereon ('proof of debt dated 30 December 2005'), be reversed and/or varied accordingly;

(b) That consequent to prayer (1) above, the applicant's proof of debt dated 30 December 2005 be admitted in full or in part, and the respondent is hereby ordered to pay to the applicant such sum as may be ordered by this honourable court from the assets of the company within 30 days from the date of this order;

(c) That pending the full and final disposal of this application, all proceedings in relation to the members' voluntary winding up of the company, including but not limited to the disposal of the assets of the company and/or any declaration of dividends and/or distribution of the assets of the company, be stayed forthwith.

A BRIEF FACTS

[2] By consent prayer (c) was granted by the previous judge on limited terms. In respect of prayers (a) and (b) the applicant says; (a) at all material times, the applicant was a creditor of the company. The applicant's claim is for monies due and owing for goods duly sold and delivered to the company; (b) the full details of the company's debt that is owing to the applicant, together with the relevant supporting documents have been furnished to the respondent in the applicant's proof of debt dated 30 December 2005; (c) notwithstanding this, the respondent has on 15 March 2007 rejected in full the applicant's proof of debt without any valid reason; and (d) the respondent's purported grounds in rejecting the applicant's proof of debt are wholly unfounded and devoid of merit.

[3] The respondent in essence says (a) the applicant's proof of debt has not been proven and thus unenforceable in law; (b) there are overwhelming documentary evidences showing that the goods supplied by the applicant to the company were defective. To say the least, the applicant had itself admitted to the defectiveness of the goods supplied and had even proposed for a compensation to the company; (c) due to the applicant's defective goods that has undisputedly attributed to the losses suffered by the company, it is justifiable for the company to set-off the applicant's debt against the losses caused to the company; (d) the respondent has acted fairly, independently and in good faith in examining the applicant's proof of debt based on documentary evidence furnished from both the applicant and the company record which are available to the respondent; (e) the appeal herein is clearly without merit, and was merely made in contemplation to cast bad light on the respondent as an independent liquidator. The applicant had throughout this appeal deliberately withheld and twisted the true facts from this court; (f) it is clear and undisputable that the applicant's claim does not sit with all available documentary evidence before the respondent; (g) the respondent has acted fairly and correctly in rejecting the applicant's proof of debt.

PRELIMINARIES

[4] The application is made pursuant to Companies (Winding Up) Rules 1972 ('WR 1972'), r 93 which reads as follows:

> 93 Appeal by creditor.
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> If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but subject to the power of the Court to extend the time, no application to reverse or vary the decision of the

liquidator in a winding up by the Court shall be entertained, unless notice of the application is given before the expiration of twenty-one days from the date of service of the notice of rejection.

[5] And the applicant also relies on s 279 of the Companies Act 1965 ('CA 1965') which reads as follows:

279 Appeal against decision of liquidator.

Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

[6] The respondent is said to have rejected the proof of debt pursuant to WR 1972, r 92 which reads as follows:

92 Examination of proof.

The liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds of the rejection.

[7] The grounds for rejection by the respondent are stated as follows:

(a) Claim of RM12,223,200

(1) That the company had allotted and issued 12,223,200 ordinary shares at RM1 each favouring See Hua Realty Bhd vide share certificate No 01/2003 duly paid in kind vide assets injection pursuant to the point of agreement dated 6 November 2000 entered between See Hua Realty Bhd and KTS News Sdn Bhd;

(2) That you have elected to seek your remedy by way of court action filed with the High Court at Kuching pertaining to the allotment and issuance of 12,223,200 ordinary shares and the same has not been decided by the High Court.

(b) Claim of RM4,999,800

(1) That the balance sum forms part of the major disputes between the shareholders;

(2) That you have elected to seek your remedy by way of court filed with the High Court at Kuching pertaining to the balance sum and the same has not been decided by the High Court.

[8] The powers and duties of the liquidator are spelt out in s 269 of the CA 1965 as follows:

269 Powers and duties of liquidator.

(1) The liquidator may —

(a) in the case of a members' voluntary winding up, with the approval of a special resolution of the company and, in the case of a creditors' voluntary winding up, with the approval of the Court or the committee of inspection, exercise any of the powers given by paragraphs 236(1)(b), (c), (d) and (e) to a liquidator in a winding up by the Court;

(b) exercise any of the other powers by this Act given to the liquidator in a winding up by the Court;

(c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be prima facie evidence of the liability of the persons named therein to be contributories;

(d) exercise the power of the Court of making calls; or

(e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution in respect of any matter or for any other purpose he thinks fit.

(2) The liquidator shall pay the debts of the company and adjust the rights of the contributories among themselves.

(3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as is determined at the time of their appointment, or in default of such determination by any number not less than two.

[9] The said s 269(1)(a) must be read with s 236(1)(b), (c), (d) and (e) which reads as follows:

236 Powers of liquidator.

(1) The liquidator may with the authority either of the Court or of the committee of inspection —

(a) carry on the business of the company so far as is necessary for the beneficial winding up thereof, but the authority shall not be necessary to so carry on the business during the four weeks next after the date of the winding up order;

(b) subject to section 292 pay any class of creditors in full;

(c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(d) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims, present or future, certain or contingent, ascertained or sounding only in damages subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof; and

(e) appoint an advocate to assist him in his duties.

(2) The liquidator may —

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

(b) compromise any debt due to the company other than calls and liabilities for calls and other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit;

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's seal;

(e) prove rank and claim in the bankruptcy of any contributory or debtor for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt and rateably with the other separate creditors;

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(g) raise on the security of the assets of the company any money requisite;

(h) take out letters of administration of the estate of any deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall for the purposes of enabling the liquidator to take out the letters of administration or recover the money be deemed due to the liquidator himself;

(i) appoint an agent to do any business which the liquidator is unable to do himself; and

(j) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

[10] I note even a liberal reading of s 269 and the whole s 236 does not give any power to the liquidator to reject the creditors claim. The so called powers, spelt out in r 92 of the WR 1972 which is only a subsidiary legislation run foul of the Parent Act (see s 23 of the Interpretation Act). But courts have often recognised r 92. As both parties did not address this issue I do not want to deliberate further save to say that r 92 must not be considered as a power but merely a procedural formality, subject to appropriate directions of court, pursuant to s 279 and r 93 of the WR 1972.

[11] I have read the notice of motion, supporting affidavits, submission of parties etc; in detail. I take the view the plaintiff's application ought to be allowed with appropriate directions. My reasons are as follows:

(a) In this case the plaintiff's claim as a creditor arises in respect of goods sold and delivered. There is no dispute as to the facts that the goods were sold and delivered as the respondent's grounds succinctly admits that and attempts to set-off against losses. In *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157; [1985] 1 CLJ 242, the Federal Court, inter alia, held:

> In Malaysian Law, there was no legal right of set-off but only equitable set-off. Definitior of a set-off is a cross-claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. Whether or not the plea is a set-off has to be determined as a matter of law and substance. The matter sought to be set-off has to be determined as a matter of law and substance. The matter sought to be set-off must essentially be connected with or form part of the matter upon which the plaintiff's action is founded.

In actual fact, the act of set-off is an adjudicating process and the liquidator is not empowered to do so pursuant to ss 269 or 236 which I had stated earlier. In *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12 the Court of Appeal made the following observations.

> Common law cases indicate that the courts are reluctant to interfere with the decision of a liquidator and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. In this regard, reference may be made to *Re Edennote Ltd* [1996] 2 BCLC 389 where Nourse LJ said that at p 393:
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> > in general, there seemed to be something unrealistic in judging the propriety of the acts and decisions of a businessman by asking whether he took into account something he ought not to have taken into account or failed to take into account something he ought to have taken into account.
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> > That said, it is certainly possible for a liquidator to do something so utterly unreasonable and absurd that no reasonable man would have done it, simply by selling an asset of the company without taking into account the possibility that a third party might well have made a better offer than he to whom it was sold.

(b) In the instant case the act of rejection of proof of debt on the grounds stated by the liquidator is erroneous, and no reasonable person would have done so. In this respect the respondent's reliance on the cases of (i) *KTS News Sdn Bhd v See Hua Realty Bhd & Ors* [2006] MLJU 360 (ii) *Wangi Forwarding & Shipping Sdn Bhd v MBf Commercial Vehicles Sdn Bhd; Turbo Age Sdn Bhd (Applicant)* [2006] MLJU 405 (iii) *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12 does not apply to the facts of our case.

(c) The respondent's argument that since the proof of debt has not been proven yet and in consequence the liquidator can reject the claim in reliance of the Court of Appeal decision in *Kerajaan Malaysia v Chew Boon Heow (as liquidator for Syarikat Sin Hwa Plantations Sdn Bhd* [2002] 2 MLJ 266 is not correct. For, in this instant case, we are dealing with voluntary liquidation. Under ss 269 and 236 of the CA 1965 all debts are provable. The manner debt must be proved is set out under r 79 of the WR 1972 which reads as follows:

79 Mode of proof.

A debt shall be proved in any winding-up by delivering or sending to the liquidator an affidavit verifying the debt together with the prescribed filing fee.

In addition, s 291(1) of the CA 1965 states:

291 Proof of debts.

(1) In every winding up, subject in the case of insolvent companies to the application in accordance with this Act of the law relating to bankruptcy, all debts payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.

However, when the debt relates to a winding up proceeding, the law requires that the debt must be proved. This distinction must be kept in mind, as it is particularly dealt with in r 78 of the WR 1972, which states as follows:

78 Proof of debt.

In a winding-up by the Court every creditor shall prove his debt, unless the Judge in any particular winding-up shall give directions that any creditors or class of creditors shall be admitted without proof.

(d) Section 528 of the Indian Companies Act 1956 is similar to s 291(1) of our Act. And learned Author LC Goyle in his book titled *Law & Practice of Company Winding Up* at p 200 makes the following observation for solvent company as follows:

Section 528 and 529 between them lay down the rules for the proof of debts and claims. If the company is a solvent company, in that case section 528 provides that all claims against the company shall be provable. Claim includes every type of claim, present or future, certain or contingent, ascertained or sounding only in damages. Similarly the debt may be payable on a contingency. If the debt or claim is subject to any contingency or sounds only in damage or for some other reason does not bear a certain value, in that case a just estimate of the debt or claim may be made. Even so, the claim or the debt must not be barred by limitation on the date of the winding up order, even if on the date of proof it has become time barred.

And in the case of insolvent companies, the learned author makes the subtle distinction at p 203 which reads as follows:

> However if the company is an insolvent company, in that case the rules contained in the Insolvency Acts shall prevail and be observed with regard to (a) debts provable, (b) the valuation of annuities and future and contingent liabilities; and (c) the respective rights of secured and unsecured creditors. The relevant rules are contained in the Presidency-Towns Insolvency Act 1909 (ss 46 to 50) and in the Provincial Insolvency Act 1920 (ss 45 to 50). It has been held that the expression 'winding up of an insolvent company' mean the winding up of a company which is placed in liquidation on the basis that it is insolvent, that is to say, is unable to pay its debts as and when they become payable. But once the liquidation throws up a surplus, the company cannot be called an insolvent company and the rules of insolvency will cease to apply. Again, the rules of insolvency will apply only in respect of the matters specified above and to none other.
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> And says in the case of insolvent company the test is that the debt provable must accrue before adjudication; if it accrues after adjudication and before discharge, it is provable only if the obligation giving rise to debt was incurred before adjudication.
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> Thus, there is a distinction between 'debts', 'provable debts' etc in relation to solvent and insolvent companies. Thus, the respondent's reliance on cases relating to insolvent companies does not assist when it relates to voluntary winding up of solvent companies as opposed to a winding up by order of court, of insolvent companies.

(e) I will go to the extent of saying where the company is solvent, the liquidator has no right to reject a lawful claim as s 269(2) of the CA 1965 specifically says the liquidator must pay the debts of the company. And if he does not do so, he is at the peril of being sued and probably be liable in negligence if distribution has taken place (see in *Re Home and Colonial Insurance Co Ltd* [1930] 1 Ch 102). In all cases inclusive of insolvent company where the liquidator takes the view the claim is not maintainable he may ask proper directions from court naming the relevant parties or request the creditor or claimant to seek appropriate directions from the court etc; all this will be within his powers and duties entrusted in s 269 to be read with s 236 of the CA 1965. In essence the Companies Act or Winding Up Rules does not encourage any form of high handedness by the liquidator. Courts will not ordinarily entertain such conduct, as s 274 of the CA 1965 is specifically enacted, inter alia, to arrest high handed conduct of liquidator. And that section reads as follows:

> 274 Application to Court to have questions determined or powers exercised
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> (1) The liquidator or any contributory or creditor may apply to the Court —

(a) to determine any question arising in the winding up of a company;

(b) to exercise all or any powers which the Court might exercise if the company were being wound up by the Court.

(2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

(f) This section in my view to some extent has dealt away with the common law position that courts will be reluctant to interfere with the decision of the liquidator. The statute imposes on the court a duty to interfere when there is a threat of justice, equity and good conscience likely to be compromised by the conduct of the liquidator. The liquidator is under a duty to use his skill, diligence, competence, and knowledge properly attributable to a professional person, and if he so acts, he has fulfilled the statutory duty but that does not necessarily mean the court has no powers to interfere pursuant to s 274 of the CA 1965, but ordinarily it will not do so. It must be emphasised here that a high standard of care is required from a liquidator, since by accepting office, he undertakes duties for reward. It will be always prudent for a liquidator in every case of serious doubt or difficulty in relation to performance of his statutory duties, to submit the matter to court and to obtain its guidance (see *In Re Home and Colonial Co Ltd* [1930] 1 Ch 102). In *Re Lubin, Rosen and Associates Ltd* [1987] 1 WLR 93, it was held that it is undesirable for a voluntary liquidator to take steps which appear to be designed to secure support for himself and be discouraging to creditors who take a contrary view. A voluntary liquidator ought not to even give the appearance of being one-sided in such matters. A liquidator who does this at least exposes himself to the comment that he does not seem to have full appreciation of his position. The Federal Court in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatriam & Ors* [1995] 2 MLJ 709 was critical when the trial judge had relied on the liquidator and the liquidator seemed to have sided with the respondent where the liquidator has failed to consider the appellant's right ie her right to share in the company surplus assets etc; Mohamed Dzaiddin FCJ (as he then was) observed:

> according to counsel, the duty of the liquidator was to act impartially and to draw the attention of the court to facts and matters which were material for the court's consideration. We would agree with the above proposition. In *Gooch*'s case (1872) 7 Ch App 207, it was stated that of the most

importance that the liquidator should ... maintain an even and impartial hand between all individuals whose interests are individuals whose interests are included in the winding up. He should have no leaning for or against any individual whatsoever.

From the Federal Court decision, it is quiet clear that a person who holds the status of liquidator, or any persons or its like, whether or not appointed by court, for reward, has a high standard to meet and the court will not ordinarily take the common law position that court will be reluctant to interfere with the decision of such persons.

(g) In the instant case the applicants have filed a civil suit which has not been determined and also filed proof of debt with the liquidator which was rejected. It will be proper exercise of judicial discretion pursuant to s 279 of the CA 1965 to direct the liquidator to accept the proof of debt and make the payment (if any) in respect of the applicant's claim after the final determination of the suit inclusive of the appeal process. And for this purpose the respondent is at liberty to stay the distribution of assets of the company or proceed with the distribution subject to reserving the sum claimed by the applicant with interest, costs etc; sufficient to meet the applicant's claim. Support for my decision is found in the case *ERPIMA SA v Chee Yoh Chuang & Anor* [1998] 1 SLR 83 when the Singapore Court held as follows:

(a) It was not merely the function of the court to say that the decision to reject the proof of debt was right or wrong; it could vary it in any way it thought necessary in the light of the evidence before the court ...

(b) As to the mode of hearing, there was no rule of universal application that in the absence of any contrary sworn statement no cross-examination would be ordered. Cross-examination would be ordered where it was necessary for fairly disposing of the particular issue. What mode of trial would be necessary for fairly disposing the issues in each appeal against a rejection of a proof of evidence would depend on the circumstances of a particular case ...

(c) In the light of the conflicting affidavit evidence, which in some issues were not backed up by documentary evidence, the conclusion was irresistible that the resolution of the issues required the trials in the usual way of both suits instituted by the plaintiffs. Evidence by affidavits were inappropriate to resolve the issues ...

(d) The appropriate order to make was to dismiss the originating summons but order that the outcome of the proof of debt should

abide by the final determination for the two suits in which all issues in controversy among the plaintiffs.

[12] For reasons stated above, I allow the applicant's application with the following orders:

(a) the decision of the respondent is set aside;

(b) the proof of debt dated 30 December 2005 to be accepted by the respondent and make payment (if any) after the final determination of the Shah Alam Civil MT1–22–371 of 2005 inclusive of appeal process;

(c) the respondent to stay the distribution of assets of the company until final determination in the above suit or proceed with the distribution, subject to reserving the sum claimed by the applicant with interest, costs etc; sufficient to meet with the applicant's claim.

(d) no order as to costs.

[13] I hereby do so.

Plaintiff's application allowed with no order as to costs.

Reported by Kanesh Sundrum